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Supreme Court of the United States

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY, *Petitioner*,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE NATIONAL CHAMBER LITIGATION CENTER AS *AMICUS CURIAE*

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BRIEF FOR THE NATIONAL CHAMBER LITIGATION CENTER AS *AMICUS CURIAE*

STATEMENT OF INTEREST*

The National Chamber Litigation Center [hereinafter the Center] is a non-profit, tax-exempt corporation organized and operated under the laws of the District of Columbia. Center members include trade associations and corporations of all sizes, representing a cross section of employees throughout the United States. The Center is organized and operated as a busi-

* Written consent of the parties to the filing of this brief has been obtained as required by Rule 42(2) of the Supreme Court Rules.

ness-oriented, public interest law firm, with its attorneys serving as counsel in matters important to commerce and industry.

The Center's membership is comprised of employers subject to the provisions of the Equal Employment Opportunity Act, including those provisions relating to the payment of attorneys' fees and costs at issue here.

The issue of awards of attorneys' fees is crucial to the Center's own operations. Entirely dependent upon membership dues and other voluntary contributions for its fiscal well-being, the Center's only other potential source of operating revenues rests in the award of attorneys' fees upon conclusion of litigation. Judicial application of a restrictive standard to prevailing employer/defendants discriminates against the Center as well as others representing employer interests in Title VII cases. Where statutes permitting awards of attorneys' fees to prevailing parties exist, they must apply on an equal basis to each prevailing party. To do otherwise would be an invidious discrimination of the variety justly struck down by this Court in the past.

STATUTE INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

QUESTION PRESENTED

Should the standard applied by district courts in exercising their discretion in awarding attorneys' fees to a prevailing defendant in a Title VII action under the Civil Rights Act of 1964, as amended, (42 U.S.C. §2000e) be the same as the standard for a prevailing plaintiff?

ARGUMENT

I

THE HISTORY OF ATTORNEYS' FEES IN THE UNITED STATES AS WELL AS THE LEGISLATIVE HISTORY AND PLAIN MEANING OF SECTION 706(k) ESTABLISH THAT PREVAILING DEFENDANTS SHOULD BE AWARDED ATTORNEYS' FEES ON THE SAME BASIS AS PREVAILING PLAINTIFFS.

A. History of Attorneys' Fees

In the absence of statutory or contractual provisions to the contrary, a prevailing litigant in the United States is not ordinarily entitled to collect attorneys' fees from the loser. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717 (1967).[1] Two nonstatutory exceptions to this "American Rule" have been developed by the courts in the exercise of their equitable powers. *Hall* v. *Cole*, 412 U.S. 1, 4-5 (1973).

The first exception is that attorneys' fees will be allowed to a successful litigant, where the "litigation confers a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an

[1] The *amicus* relies on Petitioner's statement of the case and its recitation of the Opinion Below and Jurisdiction.

award that will operate to spread the costs proportionately among them." *Id.* quoting *Mills* v. *Electric Auto-Lite,* 396 U.S. 375, 393-394 (1970). The second exception to the American Rule is that federal courts can award attorneys' fees to a litigant where the opponent has acted "in bad faith, vexatiously, wantonly or for oppressive reasons." *Hall* v. *Cole, supra; Alyeska Pipeline Service Co.* v. *Wilderness Society, supra* at 258-259.

In addition to these "common law" exceptions to the American Rule, Congress has made "specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." *Alyeska Pipeline Service Co., supra* at 260. These statutes greatly expand the exceptions to the American Rule by providing for the payment of attorneys' fees in a wide diversity of cases. It is important to emphasize that the statutory expansion is in addition to and not a codification of the common law exceptions. This Court stated in *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, footnote 4 (1968):

> 4. If Congress' objective had been to authorize the assessment of attorney's fees against defendants who made completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'

Thus, the Court must start with a statutory standard beyond the bad faith exception provided by common law. *See also, Bell* v. *Alamatt Motel,* 243 F. Supp. 472, 474 (N.D. Miss. 1965).

These statutory attorneys' fees provisions fall into several categories depending on what Congress was attempting to accomplish in each statute. Some statutes allow only prevailing plaintiffs to recover fees, but under other statutes, either party can recover if he or she prevails. Furthermore, under some statutes, the payment is mandatory. For example, under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1973), payment of attorneys' fees to prevailing plaintiffs is mandatory,[2] while under Section 812 of the Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1974), attorneys' fees may be awarded only to a prevailing plaintiff at the discretion of the court.[3] Numerous statutes similar to that in the instant case allow the payment of attorneys' fees, at the discretion of the court, to the prevailing party.[4] Thus, as this court has held:

> Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine. *Alyeska Pipeline Service Co., supra* at 262.

It is evident that Congress knew how to treat plaintiffs and defendants differently where there existed a reasonable basis for that difference. Thus, where no such difference exists, the Court should not infer different standards.

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[2] *See also,* 52 Stat. 1069, as amended by 29 U.S.C. § 216(b), *Alyeska, supra* at note 34.

[3] *See also,* Labor Management Reporting and Disclosure Act, § 501, 29 U.S.C. § 501(b) (1975).

[4] *See, e.g.,* Copyright Act, § 1, 17 U.S.C. § 116 (1952); Trust Indenture Act of 1939, § 323, 15 U.S.C. § 77 www(a) (1971); Securities Act of 1933, § 11, 15 U.S.C. § 77k(e) (1971).

B. Attorneys' Fees Under the Civil Rights of 1964.

Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1974) provides that:

> In any action . . . the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee. . . .

Where the plain meaning of a statute is clear on its face, it is unnecessary to refer to the legislative history. *United States* v. *Standard Brewery,* 251 U.S. 210, 217 (1920); *United States* v. *Oregon,* 366 U.S. 643, 648 (1961). Where the language of the statute is clear, it is not for a court to say that a legislative act encompasses a more restrictive meaning. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 200-201 (1976); *United States* v. *Kelly,* 519 F.2d 251, 256 (8th Cir. 1975). The meaning of this section is clear and unequivocal on its face; if either party, except the Commission, prevails, it is entitled to be considered for an award of attorneys' fees. *Van Hoomissen* v. *Xerox Corporation,* 503 F.2d 1131, 1133 (9th Cir. 1974).[5] No distinction is drawn by the statute between prevailing plaintiffs and prevailing defendants. In *Newman* v. *Piggie Park Enterprises, supra* at 402, this Court set the test for award of attorneys' fees under Title II of the Civil Rights Act of 1964.[6] There, the court held that a prevailing plaintiff "should ordinarily recover his attorney's fees unless special circumstances would render such an award unjust". This test has been held appropriate in awarding attorneys' fees to successful plaintiffs in Title VII litigation. *Lea* v. *Cone Mills,* 438 F.2d 86, 88 (4th Cir. 1971). Despite this, the Fourth Circuit in the instant litigation ignored the plain meaning of Section 706(k) and the Supreme Court's instruction in *Newman* v. *Piggie Park Enterprises, supra,* that the statutory standard went beyond the bad faith common law exception.

[5] *Accord, United States Steel Corp.* v. *United States,* 519 F.2d 359, 362 (3rd Cir. 1975).

[6] The language of the attorneys' fees provision of Title II is almost identical to that here. 42 U.S.C. § 2000a-3(b) (1974). The only differences in language are that Section 202(b) refers to "the United States", while § 706(k) refers to "the Commission or the United States" and Section 202(b) begins "In any action commenced pursuant to this title", while 706(k) begins "In any action or proceeding under this title."

C. Legislative History of Section 706(k)

Although resort to legislative history is not necessary to determine the meaning of this statute, a review of this confirms its plain language. The legislative history of the Civil Rights Act of 1964 establishes that Congress had a dual purpose in providing that prevailing parties in Title VII litigation could obtain attorneys' fees. Those purposes were to encourage plaintiffs of limited means to bring meritorious actions, and equally important, to deter the bringing of lawsuits without foundation. *Grubbs* v. *Butz,* 548 F.2d 973, 975 (D.C. Cir. 1976); *U.S.* v. *Gray,* 319 F. Supp. 871, 872-73 (D.R.I. 1970), *quoting with approval, Bell* v. *Alamatt Motel, supra.*

The only discussion in the legislative history[7] which is truly illuminating as to the intent of Congress in en-

[7] Although not part of its official history, Title VII has its origin in many laws going back to 1944. *See,* Hickey, *Government Regulation of Union Racial Policies,* 7 B.C.Ind. and Comm. L. Rev. 191 (1966). However, the principal thrust for the present statute was

acting the attorneys' fee provision is the statement made by Senator Pastore on the Senate floor during debate on the Civil Rights Act of 1964:[8]

> The purpose of this provision in the modified substitute is to discourage frivolous suits. Here the court within its discretion is given power to order payment of attorneys' fees to the prevailing party. First of all, it is within the discretion of the court. *It is not favoritism toward one party, as against the other. When a person realizes that he takes the chance of having attorneys' fees assessed against him if he does not prevail, he will deliberate before he brings suit. He will make certain that he is not on frivolous ground.* (emphasis added) 110 Cong. Rec. 14214 (1963).

Senator Lausche concurred in this assessment stating:

> that language was inserted in the bill to deter the bringing of lawsuits without foundation.
>
> * * *
>
> In this bill we wanted to discourage the bringing of lawsuits and we therefore provided that attorney's fees shall be allowed only in favor of the victorious party. 110 Cong. Rec. 13668-69 (1963).

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a bill introduced in 1963 by Representative Celler. Section 204(b) of that proposal provided for attorneys' fees for "the person aggrieved". Hearing before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 88th Cong., 1st Sess., Part 1, page 653 (1963). The substitution of the phrase "prevailing party" for "the person aggrieved" in the statute introduced the following year indicates a conscious awareness that plaintiffs and defendants should be treated equally.

[8] Senator Pastore's remarks were directed toward the attorneys' fee provision of Title II of the Act. As previously noted that provision is essentially identical to the one in Title VII. *See, supra,* n. 6.

The remarks of Senators Pastore and Lausche regarding this interpretation of the provision were undisputed.[9]

Relying upon the comments of the two Senators, the court in *United States* v. *Gray, supra* at 873, agreed that prevailing plaintiffs and defendants should be treated equally and awarded attorneys' fees to the defendants.[10] Similarly, the United States Court of Appeals for the District of Columbia Circuit has stated:

> But second, and *equally important,* Congress intended to deter the bringing of lawsuits without foundation by providing that the 'prevailing party'—be it plaintiff or defendant—could obtain legal fees. Were this not Congress' intent, it would have authorized fees only to prevailing plaintiffs, or to any party as it has done in many other circumstances (emphasis added). *Grubbs* v. *Butz, supra,* at 975-76.

In light of the foregoing, it is clear that Congress was as concerned with the rights of successful defendants vis-a-vis attorneys' fees as it was with those of successful plaintiffs and that fees should be awarded to successful parties on the same basis.

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[9] See also remarks of Senator Miller that "ambulance chasing" is discouraged by the fact that attorneys' fees are awarded to the prevailing party. 110 Cong. 14213-14 (1963).

[10] The district court in *Gray* appears to have misapplied the standard set by this court in *Newman* v. *Piggie Park, supra.* There, this Court said that absent exceptional circumstances, successful plaintiffs should be awarded attorneys' fees in Title II cases. The district court, although noting *Piggie Park* and expressing its belief that plaintiffs and defendants should be treated equally, applied a "meritless standard" in awarding fees to the defendant. *See, infra,* p. 22.

This conclusion is buttressed by the legislative history of the Equal Employment Opportunity Act of 1972[11] which amended Title VII of the 1964 Civil Rights Act. The most significant change wrought by the 1972 Act was, of course, to vest the Equal Employment Opportunity Commission with the power to sue to enforce the Act, thereby eliminating the prior Act's almost total reliance on individuals pursuing relief with their own resources.[12]

The 1972 legislative history indicates no disagreement either with the meaning ascribed to the attorneys' fees language by Senator Pastore, *supra,* or with the interpretations of the courts in awarding attorneys' fees on an equal basis to plaintiffs and defendants. Although several attempts were made in 1972 to amend the attorneys' fee section of the 1964 Act, the final bill left it unchanged. While not ultimately adopted, the proposed amendments are instructive as to Congress' interpretation of the 1964 Act.

In this regard, the Senate had adopted an amendment which would have mandated the payment of attorneys' fees to small businesses and unions in any Title VII actions brought by the EEOC or the government, unless it was found that the defense had been put forth in bad faith. *Leg. Hist.* 1177-1180, 1185.[13] The Senate receded from the amendment in conference, apparently because of concern that it would encourage

[11] 86 Stat. 103 (1972).

[12] *See,* Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 G.W.L.R. 824 (1972).

[13] *Leg. Hist.* references are to the Committee Print. Legislative History of the Equal Employment Opportunity Act of 1972 (November 1972).

unworthy defenses and because it was not related to the outcome of the litigation. *Leg. Hist.* 1183-84, S. Rep. No. 92-681, 92nd Cong., 2d. Sess. 19 (1972). Yet the concern of Congress with the heavy financial burden imposed on defendants was clear.

This concern is also indicated by the House's rejection of a bill which would have amended Section 706(k) to allow only "prevailing plaintiffs" to be granted attorneys' fees. Under that proposal, defendants would have been able to recover attorneys' fees only under the American Rule. This revision of the bill was replaced on the House floor by a substitute which left 706(k) unchanged.[14] Rejection of the "prevailing plaintiff" language indicates that Congress believed section 706(k) required a test other than the bad faith test of the American Rule. If Congress had felt that the traditional American Rule left defendants adequately protected, no purpose would have been served in dropping the Committee revision of the bill.

Thus, it is significant that the attorneys' fee section was attacked from both sides; by those who wanted to restrict it to plaintiffs, and those who wished to make it mandatory for defendants. That the amendment emerged unscathed is certainly indicative of the fact that Congress believed the original provision applied equally to both plaintiffs and defendants.

D. Other Attorneys' Fees Provisions in the Civil Rights Act.

We have already noted that the attorneys' fees provision of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000 a-3(b), Section 204, contains language es-

[14] *Compare* H. Rep. No. 92-238, 92nd Cong. 1st Sess. 32 (1971) *with* 117 Cong. Rec. 31979-80, 32110-13 (1971).

sentially identical to that in Title VII. Moreover, an examination of the attorneys' fee provision in Title III of the Civil Rights Act of 1964, 42 U.S.C. § 2000b-1 (1974)[15] which contains no provision for actions by private plaintiffs (actions can only be brought by the Attorney General) is illuminating.

There Congress provided that attorneys' fees could be imposed upon the government, but the government was not allowed to collect fees. Thus, Congress was not concerned with allowing private defendants to recover attorneys' fees from the government where it is an unsuccessful plaintiff as it was in the instant case. But more importantly, it indicates that Congress in enacting the Civil Rights Act was fully able to structure a provision which provided that attorneys' fees could be awarded differently based on the identity of the parties. Because such a provision is conspicuous by its absence in Section 706(k), it should not be so construed.

E. Conformity with Other Prevailing Party Statutes

The decision of the Fourth Circuit below not only conflicts with the plain meaning of Section 706(k) and its legislative history, but also with the interpretation accorded similar provisions of other statutes. In this regard, the United States Court of Appeals for the Second Circuit in applying the attorneys' fees provision of Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k(e) (1971)[16] held that the test to be applied to both plaintiffs and defendants was to be the

[15] 42 U.S.C. § 2000b-1 provides: "In any action or proceeding under this subchapter the United States shall be liable for costs, including a reasonable attorneys' fee, the same as a private person."

[16] 15 U.S.C. § 77k(e) authorizes a fee award if "the court believes the suit or the defense to have been without merit."

same. *Aid Auto Stores, Inc.* v. *Cannon,* 525 F.2d 468, 471 (2d Cir. 1975). In *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 484 F.2d 1331, 1338 at n. 7 (1st Cir. 1973), the court held that under Section 304(d) of the Clean Air Act, 42 U.S.C. § 1857(h)-2d (1969),[17] the parties should be treated equally in awarding fees, since "... the identity of the party ... would be of little moment." Moreover, under other acts with attorneys' fees provisions similar to those here, there are no indications of any different treatment of plaintiffs and defendants. Noise Control Act of 1972, § 12, 42 U.S.C. § 4911(d) (1977); Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C. § 1132 (g) (1975).

We submit that there is no rational reason for ignoring the intent of Congress and treating prevailing defendants any differently under this statute than they are under any of the other statutes with similar provisions.

II

PUBLIC POLICY SUPPORTS THE AWARD OF ATTORNEYS' FEES TO PREVAILING DEFENDANTS ON THE SAME BASIS AS TO PREVAILING PLAINTIFFS.

The plain language of Section 706(k), the legislative history of the 1964 Civil Rights Act and the 1972 amendments thereto, and an analysis of the evolution by statute and case law of the right to attorneys' fees, all support the position that in Title VII cases, plaintiffs and defendants deserve equal treatment when a court exercises its discretion to award attorneys' fees. The same position is reached as a matter of public

[17] Section 304(d) permits an award "to any party, whenever the Court determines such an award is appropriate".

policy. There is no generic difference between plaintiffs and defendants, and the potential award of attorneys' fees should be focused as much on encouraging meritorious litigation as on discouragement of suits without merit. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra.*

A. The Title VII Respondent

The potential of a Title VII lawsuit confronts not only giant industries, but also individuals employing as few as 15 persons per working day for twenty calendar weeks a year. Section 701(a), (b), 42 U.S.C. § 2000e (a) & (b) (1974).[18] The broadly phrased statutory language of Title VII encompasses non-profit organizations and charitable groups such as hospitals, churches, schools and community service organizations. *See, e.g., Mosby* v. *Webster College,* 423 F. Supp. 615 (E.D. Mo. 1976); *Willett* v. *Emory & Henry College,* 427 F. Supp. 631 (W.D. Va. 1977); *McClure* v. *Salvation Army,* 460 F.2d 553 (5th Cir. 1972) *cert. den.* 409 U.S. 896 (1972), *reh. den.* 409 U.S. 1050 (1972); *Equal Employment Opportunity Commission* v. *Metropolitan Atlanta Girls Club, Inc.,* 416 F. Supp. 1006 (N.D. Ga. 1976); and *Garnett* v. *Holy Cross Hospital,* —— F. Supp. —— 14 FEP Cases 354 (D. Md. 1975).[19]

In all of these cases, the defendant organization had to bear its own attorneys' fees, and in all of these cases

[18] The Department of Labor estimates that 98% of the businesses subject to state unemployment laws employ 99 or less employees. U.S. Department of Labor, Bureau of Labor Statistics, Employment and Wages, First Quarter of 1975, p. 20 (1976).

[19] This and subsequent citations refer to the cases as reported in the Bureau of National Affairs Fair Employment Practices Cases. These cases have not been officially reported.

except in *Metropolitan Atlanta Girls Club* the defendant prevailed. It is fair to assume the money for these fees came from funds that would otherwise have been directed toward education, medical care and community service. As the United States Court of Appeals for the First Circuit noted:

> For private colleges and universities, not only do heavy litigation expenses impose a financial burden which may ultimately be passed on in some measure to students or be absorbed to the detriment of some educational function, but the process of involving every department in depth in fact finding and defense may well be deeply disruptive to the institution's mission. In both a material and non-material sense they are fragile, not perhaps in their capacity to endure but in their capacity to remain effective while enduring. This is not to suggest that other institutions, such as hospitals or small businesses, may not be similarly burdened. *Lamphere* v. *Brown University,* —— F.2d ——, slip opinion, p. 11 (1st Cir. April 25, 1977)

The size of fees to defend a Title VII case which is a burden even for large businesses, is a financial disaster for small businesses and non-profit organizations. This fact has been judicially recognized in at least one reported decision in which the EEOC argued against attorneys' fees for a prevailing employer defendant on the basis that its suit was brought in good faith:

> Plaintiff reads something into the pertinent statute, *supra,* which is not there. The Court does not question Plaintiff's good faith but this is not all that should be considered under the Statute in the exercise of discretion on this point. Considerations regarding Defendant's size and financial stature and the impact of this litigation on its operation dictate in the opinion of the Court that it should

recover a reasonable attorneys' fee herein. *Equal Employment Opportunity Commission* v. *Service Container Corp.*, 418 F. Supp. 898, 901 (W.D. Ok. 1976)

The following cases, while involving awards of attorneys' fees to successful plaintiffs, are illustrative of the burden of successfully defending a Title VII suit. For example in *Equal Employment Opportunity Commission* v. *Enterprise Ass'n.*, 542 F.2d 579 (2nd Cir. 1976), an award of $50,000 in attorneys fees was affirmed, while the charging party had originally sought $128,092. An interim fee of $125,000 was awarded following a request for $263,038 in fees in *Patterson* v. *American Tobacco Co.*, 11 FEP Cases 586 (E.D. Va. 1976). A minority class action brought $35,000 in attorneys' fees in *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975), U.S. App.Pending, No. 76-1060 while $27,244 went to plaintiff's attorneys for a sex bias class action in *Ostapowicz* v. *Johnson Bronze Co.*, 12 FEP Cases 1468 (W.D. Pa. 1974). In *Rosenfeld* v. *Southern Pacific Railway Co.*, 4 FEP Cases 72 (D.C. Cal. 1971), a non-class sex discrimination case brought $30,000 in attorneys' fees, and $20,000 in fees for plaintiffs plus $5,000 for intervenors was awarded in *Taylor* v. *Goodyear Tire & Rubber Co.*, 6 FEP Cases 672 (D.C. Ala. 1973). Intervenors' attorneys were more fortunate in *Alaniz* v. *California Processors, Inc.*, 13 FEP Cases 738 (N.D. Cal. 1976) recovering $35,000 in a Title VII proceeding. And in at least one Civil Rights Act case, attorneys' fees exceeded $200,000. *United States* v. *United States Steel Corporation*, 7 FEP Cases 320 (D. Ala. 1973).[20] Some

[20] In non-civil rights cases, fees have reached ten million dollars. Wolfrom, *The Antibiotics Case*, 1976 Research Journal 251, 327-37, 359.

courts have even offered incentive bonuses in Title VII cases. *Parker* v. *Matthews*, 13 FEP Cases 595, 602-603 (D. D.C. 1976).

When Title VII defendants incur similar expenses in opposing invalid lawsuits, they should be entitled to a fee award on the same basis as a successful plaintiff. In the absence of being able to recover these fees, the financial burden could conceivably cause the collapse of small and non-profit employers. The net result of such a collapse would be a loss of jobs for the company's employees, and, in the case of the non-profit organization, termination of important community services.

B. The Title VII Plaintiff

Title VII provides that suit may be filed by the Equal Employment Opportunity Commission or by the person aggrieved. Of course, when the Commission loses a case and is held responsible for the prevailing defendant's attorneys' fees, the courts need not be concerned with that award discouraging the Commission from instituting future actions, since as one court noted in awarding $160,000 in attorneys' fees against the Department of Labor in a sex discrimination class action, "the United States . . . has infinite ability to pay." *Copeland* v. *Usery*, 14 FEP Cases 1677, 1678 (D. D.C. 1977). Furthermore, Congress in enacting the Civil Rights Act recognized in Title III, discussed *supra*, that the government could afford to pay a prevailing defendant.

In Title VII cases where the government is not the plaintiff, individuals will often posture their cases as class actions in which substantial recoveries are sought. Policy reasons exist for making these class action plain-

tiffs responsible for attorneys' fees in cases where they are unsuccessful. The availability of a class designation may actually generate lawsuits, since the conduct of some attorneys in actions under Rule 23 of the Federal Rules of Civil Procedure indicate that they believe "the rule was adopted for their benefit rather than for the multitude of individuals comprising the class whose rights they were presumably vindicating." *Leibman* v. *J.W. Petersen Coal & Oil Co.*, 63 F.R.D. 684, 701 (N.D. Ill. 1974). Similar judicial concerns also exist in Title VII class actions. *Magana* v. *Platzer Shipyard, Inc.*, 14 FEP Cases 561, 570-575 (S.D. Tx. 1977). *See also Developments in the Law-Class Actions*, 89 Harv. L. Rev. 1318 (1976).

Since members of the class must "opt in" in order to share benefits in a Title VII class action suit, there is no reason why the class should be eligible for the benefit without assuming equal responsibility for defendant's attorneys' fees and costs should the action fail. The risk could spread among the class, which, by definition, must be of sufficient size in order to meet the numerosity requirements of Rule 23. *Weathers* v. *Peters Realty Corp.*, 499 F.2d 1197 (6th Cir. 1974). Moreover, individual plaintiffs and class action plaintiffs in Title VII cases are often assisted in their efforts to obtain redress. *EEOC* v. *Enterprise Ass'n, supra.* These groups, such as unions, have a greater capability of spreading the litigation costs among their membership than do small employers and non-profit corporations. In light of the above, it is clear that the standard for attorneys' fees should be the same for successful plaintiffs and defendants in Title VII actions.

C. Society Benefits from the Defense of Actions as Well as Their Prosecution.

No social goals warrant making a distinction between plaintiffs and defendants insofar as the award of attorneys' fees is concerned, a fact which has been recognized. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra.* Evenhanded treatment of the imposition of attorneys' fees encourages both plaintiffs and defendants to consider the merit of bringing or contesting a lawsuit, while a more permissive standard for fee awards for plaintiffs than defendants could serve to discourage a defendant from vigorously opposing a suit. Assertion of proper defenses is an essential ingredient in the proper development of the law, since a defendant is optimally situated to assist the court in considering all aspects of the issues being litigated.

Moreover, an effective Title VII defense will often inure to the good of a company's employees since benefits held by certain employees are often challenged in Title VII actions. *See e.g., International Brotherhood of Teamsters* v. *United States,* —— U.S. ——, 97 S. Ct. 1843 (1977). In the absence of an active defense, the employees' rights to these benefits will often go unprotected. In addition, civil rights actions can generate claims for reverse discrimination when an unlawfully imposed remedy for past bias limits opportunities for persons who are not members of the protected class. *Cf. Chance* v. *Board of Examiners,* 534 F.2d 993, 998 (2nd Cir. 1976).

A vigorously presented defense brings these important issues into sharper focus for the court. Lastly, the failure of an employer to present adequate defenses

may result in severe restrictions on the income of the business to the detriment of both the enterprise and its shareholders. *NAACP* v. *Federal Power Commission*, 425 U.S. 662 (1976). A vigorously presented defense brings these important issues into sharper focus for the court.

III

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES EQUAL TREATMENT OF PLAINTIFFS AND DEFENDANTS IN REGARD TO THE AWARD OF ATTORNEYS' FEES.

Although the Fifth Amendment to the United States Constitution contains no "equal protection" clause equivalent to that of the Fourteenth Amendment, the Fourteenth Amendment's equal protection clause is applicable to the Federal government through the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). If a classification would be invalid under the equal protection clause of the Fourteenth Amendment, it is also inconsistent with the due process clause of the Fifth Amendment. *Johnson* v. *Robison*, 415 U.S. 361 (1974). Thus, unjustifiable discrimination against women may violate the Fifth Amendment on equal protection grounds. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). Discriminatory enforcement of a neutral statute can also be a violation of the equal protection requirement which "prohibits discriminatory administration of valid statutes." *United States* v. *Falk*, 479 F.2d 616, 618 (7th Cir. 1973); *Shock* v. *Tester*, 405 F.2d 852 (8th Cir. 1969), *cert. den.* 394 U.S. 1020 (1969), *reh. den.* 395 U.S. 941 (1969).

Obviously not all legislative distinctions present questions of Constitutional violations. As this Court noted in *Matthews* v. *Lucas*:

> Statutory classifications, of course are not *per se* unconstitutional; the matter depends upon the character of the discrimination and its relation to legitimate legislative aims. —— U.S. ——, 96 S. Ct. 2755, 2761 (1976).

Thus, although classifications may be made to pass constitutional muster they must not treat similarly situated persons differently. *Califano* v. *Goldfarb*, —— U.S. ——, 97 S. Ct. 1021, 1027 (1977); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) and *Reed* v. *Reed*, 404 U.S. 71 (1971).

The language of Section 706(k) demonstrates that Congress has not specified different standards for prevailing plaintiffs and prevailing defendants in Title VII cases. The courts below, however, took it upon themselves to impose an unreasonable classification upon petitioner which placed it in a less favored position in violation of the Fifth Amendment to the Constitution of the United States. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886).

IV

THE APPLICABLE STANDARD IS EQUAL TREATMENT

In light of the plain meaning of section 706(k), the legislative history of that section, and the relevant policy considerations, it is mandatory that prevailing defendants be treated the same as prevailing plaintiffs when awarding attorneys' fees. Accordingly, the test for award of attorneys' fees expressed by this Court in *Newman* v. *Piggie Park, supra,* should be applied to prevailing defendants in Title VII actions. That is that fees should ordinarily be awarded, unless special circumstances would render such an award unjust.[21]

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[21] Even if this Court should not agree that the *Piggie Park* test is

The application of an objective test such as this eliminates continuing litigation over the meaning of a subjective standard, such as the common law bad faith exception followed below. Moreover, as one court has stated:

> Under the standard proposed by plaintiff [subjective good faith] in its opposition brief, no attorneys' fee could ever be awarded against the Commission as long as the EEOC attorneys subjectively felt that their litigation zeal was exercised in good faith for the noble cause of employment equality. *EEOC* v. *Western Electric Co., supra,* at 1276.

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appropriate, we submit for the reasons stated *supra* pp. 3-5, 11, that the court below was clearly in error in applying a bad faith test. *EEOC* v. *South Carolina National Bank,* 12 FEP Cases 1565, 1566 (D.S.C. 1976); *EEOC* v. *Western Electric,* 10 FEP Cases 1275, 1276 (D. Md. 1975).

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the cause remanded for determination of an appropriate attorneys' fee.

Respectfully submitted,

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